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No. 04-37

Supreme Court, U.S
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IN THE

Supreme Court of the United States

MICHAEL CLINGMAN, *et al.*,

Petitioners,

v.

ANDREA L. BEAVER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE STATES OF SOUTH DAKOTA, MARYLAND, MASSACHUSETTS, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, WEST VIRGINIA, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a state primary election law that allows a political party to invite non-affiliated voters to vote in its primary election, but not voters registered with another party, violates the First Amendment.

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INTERESTS OF *AMICI CURIAE*

Amici States strongly oppose the efforts by the respondents, aided now by the Tenth Circuit, to interfere with the States' organization and management of state-funded primary elections. This Court has repeatedly recognized that the organization and management of elections is a core aspect of state sovereignty. As the Court put it in *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 358 (1997), "[t]he Constitution grants States broad power to prescribe the Time, Places and Manner of holding Elections for Senators and Representatives, Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices." *Id.* at 358 (quoting *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208, 217 (1986)) (internal quotations omitted).

The theory adopted by the Tenth Circuit, however, would invalidate laws in numerous states that are designed to protect the integrity and cohesion of political parties. These laws, which create what are known as "closed" or "semi-closed" primaries, require a voter to withdraw her registration as a member of one party if she wishes to vote in another party's primary.

In the decision below, the Tenth Circuit held that such restrictions violate the First Amendment associational rights of a minor party that wishes to have voters registered in other parties vote in its primary. Although the Tenth Circuit has invalidated only Oklahoma's semi-closed primary system, the court's theory, if adopted by this Court, would also require the invalidation of semi-closed primaries in over one-third of the States. *See* Appendix A. That theory would also prevent the remaining States from adopting similar measures if they deem them desirable to promote party cohesion and integrity.

The Tenth Circuit's decision severely understates the value of semi-closed primaries. As the district court found below, requiring a voter to withdraw her registration as a member of

one party before she votes in another party's primary – the essence of a closed or semi-closed system – has a significant, positive impact on party cohesion and, indeed, on the parties' ability and incentives to boost voter participation in elections. If the Court were to invalidate such restrictions, it would, as the district court found here, "make registered party affiliations significantly less meaningful." Pet. App. 59.

For one thing, such a restriction helps to prevent what the district court called "poaching another party's primary election voters." Pet. App. 71. In its most extreme form, this is a tactic by which one party – perhaps a small fringe party – runs its primary in a way that drains voters from another party and thereby influences the results of that party's primary. This can happen as a result of good-faith efforts by the less well-established party to field the best possible candidate. Or it can result from deliberate manipulation by people attempting to influence the outcome in the "target" party.

Another purpose of semi-closed primaries, as the district court found, is that they tend to promote "party loyalty." Pet. App. 71. Voting in another party's primary – and thereby foregoing the opportunity to help one's own party choose its candidates – can reasonably be seen as an act of disloyalty to one's party. Thus, a legal regime that allows such actions may well send a message to voters that party loyalty is of little or no importance. On the other hand, a law requiring a voter to formally withdraw from his party to vote in another party's primary reinforces and encourages party loyalty, even as it helps to ensure that those who remain on a party's rolls are those who feel some measure of loyalty to the party.

For similar reasons, a semi-closed primary assists the parties with volunteer recruiting and voter turnout efforts. Those efforts are based in significant measure on party registration information generated by government election officials. But the utility of that information to the parties depends on the extent to which it accurately reflect a voter's general political preferences. If a voter can vote in any

party's primary regardless of her registration status, she will have much less incentive to change her registration when her political preferences change. By reducing this inaccuracy in voter rolls, a semi-closed system facilitates the parties' voter turnout efforts.

Amici States have a strong interest in preserving the cohesion, integrity and effectiveness of the political parties in both fielding candidates and in fostering voter participation in elections. The many States that now rely on a semi-closed primary to further those goals have an obvious interest in preserving a mechanism that they have found effective for those purposes. And States that do not currently use that mechanism have a strong interest in preserving their legislatures' ability to adopt it in the future, if they conclude it is needed to further the cohesion and effectiveness of the political parties operating in their states.

SUMMARY OF ARGUMENT

I. A semi-closed primary of the kind employed in Oklahoma does not violate the First Amendment rights of small parties and, indeed, fits comfortably within this Court's prior decisions in this important area. The Tenth Circuit was able to reach a contrary conclusion only by understating the states' legitimate interests in such a system, and by substantially overstating the burden that system imposes on third parties.

Contrary to the Tenth Circuit's conclusion, the burden imposed on small political parties is modest at best. Requiring that a voter registered with one party withdraw that registration before voting in another party's primary is analogous to, but creates a much smaller burden than, the rule that this Court upheld in *Storer* v. *Brown*, 415 U.S. 724 (1974). That rule required *candidates* wishing to run in another party's primary to "disaffiliate" from their existing parties at least a year prior to the primary election. Requiring

a *voter* to "disaffiliate" from his existing party, which in Oklahoma can be done approximately three weeks before the primary, imposes a much smaller burden on a party's associational rights.

The rule at issue here also imposes a smaller burden than the restriction upheld in *Timmons*, which prohibited candidates for one party from serving as candidates for another party. Like the rule at issue in *Storer*, that rule implicated a party's fundamental associational interest in its relationships with potential candidates. Yet this Court concluded that the burden was not sufficiently "severe" to warrant strict scrutiny. That is because the rule did not "restrict the ability of the New Party and its members to endorse, support, or vote for anyone they like"; it did not "directly limit the party's access to the ballot"; and it did not regulate the "parties' internal structure, governance, and policymaking." 520 U.S. at 363. The same is true of a semi-closed primary.

The burden at issue here is likewise smaller than the burden at issue in *Tashjian*, which held that the First Amendment requires that parties be allowed to open their primaries to unaffiliated voters. The Oklahoma statute, like other semi-closed primaries, allows parties to do that if they so choose. Unlike the closed primary in *Tashjian*, moreover, a semi-closed primary, by definition, does not require "a public act of affiliation" with a party in order to vote in that party's primary. 479 U.S. at 216. All it requires is disaffiliation from the voter's previous party.

Because the regulation at issue here imposes at best a modest burden on associational rights, it must be sustained if it promotes a State's "important regulatory interests." *Timmons*, 520 U.S. at 358 (internal quotations omitted). There can be no doubt that the semi-closed primary promotes important interests of the States that choose to use it. As noted earlier, that mechanism promotes three distinct goals: (1) preventing parties from "poaching" each others' voters

and thereby skewing the parties' decisions and messages; (2) promoting party loyalty, and (3) facilitating the parties' voter turnout efforts. Each of these interests has been recognized as important in decisions of this Court, including *Storer*, *Timmons*, and *California Democratic Party* v. *Jones*, 530 U.S. 575 (2000). Accordingly, the Tenth Circuit's decision must be reversed under this Court's precedents.

II. In the unlikely event this Court decides that *Tashjian* cannot be distinguished from the present case, *amici* respectfully submit that *Tashjian* should be overruled or limited to its facts. 479 U.S. 208. Since *Tashjian*, the Court has made clear that in analyzing First Amendment challenges to election laws it will first look to the magnitude of the burden that the law places on the challengers' rights. Only when this burden is severe will the Court apply strict scrutiny. *See, e.g.*, *Timmons*, 520 U.S. at 358.

Tashjian, however, never engaged in any meaningful inquiry into the burden created by the closed primary system challenge in that case. Instead, it simply assumed that strict scrutiny applies whenever a law imposes *any* burden on a party's associational interests.

Moreover, for reasons explained by the dissenters in *Tashjian*, closed primaries impose only minimal burdens on associational rights. *See Tashjian*, 479 U.S. at 235. Thus, under this Court's more recent decisions, the Court should not have applied strict scrutiny in *Tashjian*.

STATEMENT OF FACTS

Amici adopt the statement of facts in petitioner's brief.

ARGUMENT

The fundamental principle at issue in this case is whether States may impose a minimal, reasonable burden on the associational interests of a political party in order to preserve

the integrity of all political parties and ensure a stable primary election process. States have a powerful interest in maintaining procedures to ensure that elections are fair, honest, and efficient. *See Timmons*, 520 U.S. at 358 (citing *Storer*, 415 U.S. at 730). States also have "broad power to prescribe the Time, Places and Manner of holding Elections for Senators and Representatives, which power is matched by state control over the election process for state offices." *Id.* (internal citations and quotations omitted) (quoting *Tashjian*, 479 U.S. at 217). While there are limits on a State's authority to regulate elections, *Eu* v. *San Francisco County Democratic Central Committee*, 489 U.S. 214, 222-29 (1989), this Court has been reluctant to interfere with a State's good-faith efforts to provide a stable and equitable primary system. *Timmons*, 520 U.S. at 369-70. The Court should maintain and build upon that tradition by reversing the Tenth Circuit's decision here.

I. A SEMI-CLOSED PRIMARY DOES NOT OFFEND THE FIRST AMENDMENT AND FITS COMFORTABLY WITHIN THIS COURT'S DECISIONS, INCLUDING *TASHJIAN*.

Although this Court has emphasized that there is no "litmus-paper test" in this area, its cases provide a clear analytic framework for reviewing election laws challenged on First Amendment grounds. *Tashjian*, 479 U.S. at 213 (internal quotations omitted). This Court has repudiated "the erroneous assumption that a law that imposes *any* burden upon the right to vote must be subject to strict scrutiny." *Burdick v. Takushi*, 504 U.S. 428, 432 (1992) (emphasis added). Rather, the Court has recognized the need to weigh the States' broad powers to regulate the "[t]imes, Places and Manner of holding Elections," U.S. Const. art. I, § 4, cl. 1, with citizens' legitimate interests in freedom of speech and association, *see* U.S. Const. amend. I. Only those regulations "imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest."

Timmons, 520 U.S. at 358. Laws imposing a lesser burden are subject to a more deferential scrutiny and need only be supported by "important regulatory interests." *See id.* (internal quotations omitted). Accordingly, we turn first to the burdens allegedly imposed by the semi-closed primary regime.

A. Requiring Crossover Voters From One Party To "Disaffiliate" From That Party Prior To Voting In Another Party's Primary – Which Is All A Semi-Closed Primary Requires – Imposes At Most A Minimal Burden On A Party's Associational Interests.

The only barrier that a closed or semi-closed primary places on cross-over voters is the requirement that they disaffiliate from their existing party (if any) before the voter registration deadline. See, *e.g.*, Okla. Stat. tit. 26, § 1-104(B) (2004). The Tenth Circuit's characterization of this burden as "a severe one," Pet. App. 15, cannot be reconciled with this Court's prior holdings.

1. Preliminarily, it is useful to compare the restriction at issue here to that at issue in *Storer v. Brown*, 415 U.S. 724 (1974). That rule required candidates wishing to run in another party's primary to "disaffiliate" from their existing parties at least a year prior to the primary election. *Id.* at 733-34. Although the Court did not expressly determine whether the burden imposed by that rule was a "severe" one, the Court had no difficulty holding that it did not impose an unconstitutional burden.

The rule at issue here is analogous to the rule upheld in *Storer*. The differences, of course, are that the semi-closed primary rule requires voters to disaffiliate from their existing party before they vote in another party's primary, and it allows a voter to do so three weeks prior to the primary rather than a year before.

Such a requirement obviously imposes a much smaller burden on a party's associational rights than a rule requiring *candidates* to disaffiliate from their existing party a year before running in another party's primary. As this Court has repeatedly recognized, a party's candidates are its "'standard bearer[s].'" *Timmons*, 520 U.S. at 355, 359, 371, 373; *Tashjian*, 479 U.S. at 215-16; *Jones*, 530 U.S. at 575. They not only support the party's message, but they also play a major role in crafting that message and persuading others to accept it. *Jones*, 530 U.S. at 575. Because Oklahoma's semi-closed primary rule imposes far smaller burdens on voters than the rule sustained in *Storer* imposed on candidates, Oklahoma's rule can hardly be considered constitutionally suspect.

2. That conclusion is amply confirmed by comparing the semi-closed primary to other restrictions sustained by this Court. Indeed, this Court has repeatedly found – expressly, rather than implicitly, as in *Storer* – that various election regulations did *not* impose burdens sufficient to trigger strict scrutiny.

Burdick, which involved a challenge to Hawaii's ban on write-in candidates, is a good example. There, the Court analyzed the burden on individual rights by looking to the steps that would be necessary for the voter to cast the sort of vote the law purportedly burdened. The Court first observed that the ban on write-in candidates did not preclude a voter from casting a ballot for his favored candidate. 504 U.S. at 436. It simply required that the voter (or someone else) ensure that the candidate for which the voter wished to vote filed his candidacy before the deadline. *Id.* at 436-37.

To be sure, this required that the voter act several months prior to the primary election, in some cases gather signatures, and file with state election officials at the appropriate time. *See id.* at 435-36 (outlining the various ways of obtaining ballot access under Hawaiian law). But the Court concluded that these burdens were too minimal to warrant strict scrutiny.

See id. at 438-39 ("[T]he State's ban on write-in voting imposes only a limited burden on voter's rights to make free choices and to associate politically through the vote.").

The semi-closed primary regime now before the Court is significantly *less* burdensome than the regime upheld in *Burdick*. To vote in another party's primary, an Oklahoma voter need only fill out a single form and file it with her local election board secretary approximately three weeks before the primary election. *See* Okla. Stat. tit. 26, § 4-110.1 (2004). The semi-closed primary system thus places no burdens on the ability of small parties to *invite* voters to participate in their primaries. It simply creates procedures with which voters must comply to accept that invitation.

The burdens on association created by a semi-closed primary are likewise smaller than those at issue in *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973). That case involved a challenge to a New York registration law requiring voters to declare their party affiliation eight to eleven months prior to the primary election. *Id.* at 760. This Court, however, did not find this burden sufficient to warrant strict scrutiny. The rule, the Court emphasized, did not "absolutely disenfranchise the class to which the petitioners belong[, but] . . . [r]ather, the statute merely imposed a time deadline on their enrollment." *Id.* at 757. Accordingly, strict scrutiny was not required. *See id.* at 767 (Powell, J., dissenting) (arguing that the level of scrutiny applied by the majority was "rational basis"). Here again, the simple disaffiliation requirement imposed by a semi-closed primary regime is less onerous than the lengthy and time-consuming registration requirements upheld in *Rosario* and *Burdick*.

The Court's decision in *Timmons* provides another example of the sort of burden that does not trigger strict scrutiny. 520 U.S. at 357. In that case, Minnesota had banned so-called fusion candidates, making it impossible for minor parties to combine and put forward the same candidate as their joint standard bearer. The Court noted that this rule did "not

directly preclude[] minor political parties from developing and organizing." *Id.* at 361. The Court also pointed out that "Minnesota's laws do not restrict the ability of the New Party and its members to endorse, support, or vote for anyone they like." *Id.* at 363.

As in *Burdick* and *Rosario*, the Court in *Timmons* measured the burden by looking at the steps necessary to circumvent the regulation. The Court noted that parties could continue to nominate any candidate, even a candidate chosen by another party, so long as the candidates do not "themselves prefer that other party." *Id.*

The burdens imposed by the semi-closed primary are significantly less onerous than those challenged in *Timmons*. Indeed, burdens on a party's ability to affiliate with a chosen candidate – or "standard bearer" – are inherently more serious than burdens on a party's ability to affiliate with a single voter. It is logically possible for a party to affiliate with literally millions of voters in an election cycle. In contrast, a party by definition puts forward a single candidate for each office. Nevertheless, the Court in *Timmons* held that the burdens imposed by Minnesota's candidate restrictions on the party's "associational rights – though not trivial – are not severe." *Id.* at 363.

In short, a semi-closed primary allows each political party to associate with any voter it wishes *unless* the voter himself prefers to remain formally affiliated with another party. That restriction is, if anything, less burdensome than the restrictions this Court found insufficient to warrant strict scrutiny in *Burdick*, *Rosario*, and *Timmons*.

3. The Tenth Circuit also erred in relying on this Court's decision in *Tashjian* to reach its conclusion that the Oklahoma semi-closed primary imposes a severe burden on the LPO. *See* Pet. App. 12-15. In *Tashjian*, the Court struck down a Connecticut closed primary that categorically forbade anyone from voting in a party's primary unless they first

registered with that party. However, the Court expressly warned that its reasoning would not necessarily apply to a semi-closed primary. As the Court said, a rule allowing a party to open its primary "to all voters, including members of other parties, would raise a different combination of considerations." 479 U.S. at 224 n.13. A careful comparison of the Oklahoma law with the one at issue in *Tashjian* reveals just how "different" those considerations are. Although the Court in *Tashijian* provided an extensive discussion of the importance of the rights involved in the case, its discussion of the burden involved is regrettably thin. *See id.* at 213-17. In its limited analysis of the burden, however, the Court focused on two points, neither of which applies to a semi-closed primary.

First, the Court emphasized that the challenged Connecticut law "provides no means by which the members of the Party may choose to broaden opportunities for joining the association by their own act, without any intervening action by potential voters." *Id.* at 216 n.7. In contrast, a semi-closed primary gives parties the ability to throw their primaries open to independent voters if they so choose. *See* Okla. Stat. tit. 26, § 1-104(B)(1) (2004).

The second factor discussed in *Tashjian* was the fact that the Connecticut law "insist[ed] on a public act of affiliation . . . as a condition of . . . association." *Tashjian*, 479 U.S. at 216 n.7 (first omission in original) (internal quotations omitted). A semi-closed primary has no such requirement. For instance, no voter is required to register as a Libertarian in order to vote in the LPO's primary. *See* Okla. Stat. tit. 26, § 1-104(B)(1). Indeed, voters are not required to register with any party at all. *Id.*

In sum, the semi-closed primary provides an avenue for the very kind of party association that was precluded by the Connecticut law in *Tashjian*, and it does not impose the requirement of formal affiliation on voters. While it does impose a requirement that the voter disaffiliate from one party

to vote in another party's primary, that burden on associational rights is slight at best.

4. The Tenth Circuit also erred in relying on this Court's holding in *Jones*, 530 U.S. 567, to conclude that the semi-closed primary is nevertheless subject to strict scrutiny. Indeed, the law at issue in *Jones* imposed a burden of an entirely different magnitude than a semi-closed primary.

Jones involved a law affirmatively requiring that parties open their primary elections to *all* voters regardless of party affiliation, regardless even of whether those voters simultaneously participated in the primary elections of other parties on different offices. *See id.* at 570 (describing California's blanket primary system). Under that law, a voter could simultaneously vote in the Democratic primary for president, the Republican party for senate, the Green primary for congressman, and the Libertarian primary for governor. And a voter could do so despite the opposition of the Democratic, Republican, Green, and Libertarian parties to the required inclusion of such voters in their primaries. As the Court observed, the law "forces" political parties "to adulterate their candidate-selection process. . . . Such forced association has the likely outcome . . . of changing the parties' message. We can think of no heavier burden on a political party's associational freedom." *Id.* at 581-82.

A semi-closed primary places no comparable burden on political parties. It does not rip open their internal decision-making process and flood it with voters of the state's choosing rather than the party's choosing. Instead, it allows the parties to govern themselves subject only to the kind of "'reasonable, nondiscriminatory restrictions,'" *Burdick*, 504 U.S. at 434, that the Court found did not impose a severe burden in *Burdick*, *Timmons*, and *Rosario*. Accordingly, the Tenth Circuit erred in overturning the District Court's finding and in concluding that the Oklahoma law imposed a severe burden warranting strict scrutiny.

B. States Have Reasonable, Non-Discriminatory Reasons for Requiring Such Disaffiliation, And They Are, At a Minimum, Weighty Enough To Justify The Limited Burden On A Party's Associational Interests.

Besides overstating the burdens on the parties' associational rights, the Tenth Circuit understated and, indeed, largely ignored the state interests that underlie the semi-closed primary. As the district court found, those interests include: first, preventing one party from "poaching" another party's voters, thereby skewing the results of the second party's primary; and second, encouraging party loyalty and cohesion. Closed or semi-closed primaries also produce a third benefit: ensuring greater accuracy in voter registration rolls that the parties use to increase voter turnout. We address each of these interests in turn.

1. The District Court Correctly Determined That The Disaffiliation Requirement Helps Prevent One Party From "Poaching" Another Party's Voters, Thereby Potentially Skewing The Results In The Second Party's Primary.

As to the first interest: as the district court recognized, this case "affects political parties other than the party challenging the legislation in a manner and to an extent that was not present in *Tashjian*." Pet. App. 57. Unlike the rule at issue in *Tashjian* – requiring that a party be allowed to invite independent voters to participate in its primary – the rule sought by respondents, and adopted by the court of appeals, would allow one party to "poach[] another party's primary election voters." *Id.* at 71 (emphasis added).

The district court found that such a requirement could have a serious, adverse effect on the party that is the victim of poaching. Drawing an analogy to *Jones*, the district court determined that:

> the primary election format which plaintiffs assert is constitutionally *required* would have a quality which was identified as constitutionally *suspect* in *Jones*: the parties whose voters would be invited by the [LPO] into its primary would be induced . . . to skew their positions from those which they "would choose if left to their own devices."

Pet. App. 68-69. Thus, the district court concluded that the primary system sought by the LPO would "'disrupt' other parties 'from without.'" *Id.* at 69. Accordingly, the court determined that the State has an appropriate role as a "referee" between the parties (*id.* at 60), and that it may therefore "bar a party from poaching another party's primary election voters." *Id.* at 71.

The Tenth Circuit rejected this analysis. It reasoned that "the district court effectively would add a new associational right that has to this point been absent from constitutional discussion – the ability of a group to harness and control the associational opportunities of its members." Pet. App. 22. The Tenth Circuit concluded that because (in its view) the political parties enjoy no such right under the Constitution, the State could not rely on such considerations to "counterbalance" "the associational rights asserted by the LPO." *Id.* But the Tenth Circuit's analysis is wrong for at least three reasons.

First, the States' interest in shielding political parties from factionalism does not depend solely on the parties' own constitutional rights. As this Court put it in *Eu*, "a State may enact laws to prevent the disruption of the political parties from without," 489 U.S. at 227 (internal quotations omitted), even if such disruptions would not violate the parties' constitutional rights of speech or association.

Other decisions of this Court confirm this fundamental principle. In *Storer*, as noted, the Court upheld another "party-disaffiliation" rule, one that denied ballot positions to

independent candidates who had voted in the immediately preceding primary elections or had a registered party affiliation at any time during the year before the same primary elections. *See* 415 U.S. at 728. The Court did not determine that this rule was necessary, or even helpful, to protect the parties' constitutional rights. Nevertheless, the Court sustained the rule on the basis of the *State's* interest in promoting "stability" and reducing the risk of "splintered parties and unrestrained factionalism." *Id.* at 736.

The same was true in *Timmons*, in which, as noted, the Court sustained a Minnesota law barring "fusion" candidates. Once again, the Court did not rest its decision on the parties' associational rights, although they were certainly implicated. Instead, the Court based its decision on the *States'* "strong interest in the stability of their political systems." 520 U.S. at 366. That interest, the Court held, permits States "to enact reasonable election regulations that may, in practice, favor the traditional two-party system, . . . and that temper the destabilizing effects of party-splintering and excessive factionalism." *Id.* at 367.

In short, regardless of the parties' own constitutional rights, the Court held that "[t]he Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two-party system." *Id.* That, essentially, is what Oklahoma has done here, and its regulation should be sustained for the same reasons.

Second, the Tenth Circuit had no business attempting to "balance" the associational interests of the LPO and those it seeks to invite to its primary against the State's legitimate interests. To be sure, this Court in *Timmons* held that, "[w]hen deciding whether a state election law violates First and Fourteenth Amendment associational rights, we *weigh* the 'character and magnitude' of the burden the State's rule imposes on those rights against the interests the State contends justify that burden." *Id.* at 358 (internal quotations omitted) (emphasis added). But that is not the same as

"balancing" these interests *against* each other. Instead, where, as here, a regulation imposes only "[l]esser burdens" on voters' or parties' associational rights "a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Id.* (internal quotations omitted).

Here, there can be no doubt that the State has an "important regulatory interest" in avoiding factionalism and instability. Nor can there be any doubt – indeed, the Tenth Circuit did not dispute – that this interest would be undermined if parties were permitted to "poach" voters from other parties. Accordingly, because the regulation here imposes only a modest burden on associational interests, the Tenth Circuit should have upheld it without any "balancing" of interests.

Third, the Tenth Circuit's analysis ignores the threat, mentioned briefly in the district court's analysis, that "poaching" of one party's members by another party will skew the results of the first party's primary elections.

As this Court noted in *Jones*, primary elections allow political parties to choose who will be their "standard bearer" who will represent the party and its views in the general election. *Jones*, 530 U.S. at 575-76. While this is an intra-party choice, a State has an interest in ensuring that the decision is made in a democratic manner. *Id.* at 572. At the primary stage, then, the State has an interest in ensuring not only that individual voters are able to cast their ballots, but also that parties have the opportunity to elect their own representatives uninhibited by external forces. *Id.*

Here, there can be no question that the regime imposed by the Tenth Circuit could skew both the results of other parties' primaries and, as a consequence, the parties' messages. As the District Court correctly held, the "party-option open primary . . . in Oklahoma as sought by the plaintiffs would likely affect the outcome of some primary elections." Pet. App. 49. In fact, "the historical information which is in hand

with respect to the number of very close major party primary races in Oklahoma indicates convincingly that, at the margin, implementation of a party-option open primary system would affect Oklahoma primary elections." *Id.*

A semi-closed system, by contrast, helps to insulate each party from the other as they choose their candidates and messages. It helps to ensure that, during the primaries, the parties are not rivals for the attention of all voters, but are instead free to have intra-party discussions to determine the best person to represent their interests. *Jones*, 530 U.S. at 575.

Requiring open primaries (at the party's option) would thus transform a process that is intended to provide a democratic system for a party to choose its own leaders and candidates into one where any voter may help choose the candidates of any party. States are entitled to reject such a system if they so choose. As Justice Brandeis famously explained in *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), states are "laboratories of democracy" and are entitled to take different approaches to problems of law and policy. *See also Jones*, 530 U.S. at 590 ("A State's power to determine how its officials are to be elected is a quintessential attribute of sovereignty.") (Stevens, J., dissenting); *Tashjian*, 479 U.S. at 230-34 (Stevens, J., dissenting) (recognizing that the Constitution does not require voter qualifications to be identical throughout the states). While the Constitution imposes some limits on a State's choices in this area, it does not prevent a State from requiring voters to relinquish their affiliation with one party before voting in another party's primary.

2. The District Court Correctly Determined That The Disaffiliation Requirement Fosters Party Loyalty And Cohesion.

Another purpose for closed or semi-closed primaries, as the district court found, is that they tend to promote "party

loyalty." Pet. App. 71. Although the Tenth Circuit did not bother to respond to this finding, much less dispute it, it was and is correct.

This Court's decisions leave no doubt that promoting party loyalty is itself an "important regulatory interest[]." *Timmons*, 520 U.S. at 358. As already noted, *Storer* recognized the important state interest in promoting "stability" and reducing the risk of "splintered parties and unrestrained factionalism." 415 U.S. at 736. *Timmons* likewise recognized as important state interests the avoidance of "party-splintering and excessive factionalism," and added to those interests the interest in preserving "a healthy two-party system." 520 U.S. at 367; *see also* Michael A. Fitts, *Back to the Future: The Enduring Dilemmas Revealed in the Supreme Court's Treatment of Political Parties, in The U.S. Supreme Court and the Electoral Process* 97, 99-101 (David K. Ryden ed., 2d ed. 2002). Party loyalty obviously serves all of these goals. *See generally* Kelly D. Patterson, *Political Parties and the Maintenance of Liberal Democracy* 14-23 (1996) (discussing the importance of party cohesion in promoting efficient Congressional action).

Nor can there be any doubt that the semi-closed primary system promotes and encourages party loyalty. As this Court put it in *Jones*, "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promotion among the electorate candidates who espouse their political views." 530 U.S. at 574. This banding together takes place through the choice of a "standard bearer," the party nominee who will voice the party's position in the general election. *See* Kelly D. Patterson, *Political Parties and the Maintenance of Liberal Democracy* 24-59 (explaining the usual agreement between Presidential candidates and party platform). The choice of a nominee is thus "the crucial juncture at which the appeal to common principles may be translated into concerted action,

and hence to political power in the community." *Jones*, 530 U.S. at 575 (internal quotations omitted).

It follows that, at the primary election stage, there is a valid interest in requiring that an individual "formally become a member [of the party]; and once he does so, . . . *limit[ing him] to voting for candidates of that party.*" *Id.* at 577 (original emphasis omitted) (emphasis added). That is precisely what a closed or semi-closed primary does – it limits a voter who has registered with a given party to "voting for candidates of that party." Voting in another party's primary – and thereby foregoing the opportunity to help one's own party choose its candidates can reasonably be seen as an act of disloyalty to the party of which one is a member. By foreclosing such action, the semi-closed primary directly forecloses that kind of disloyalty.

A semi-closed primary also encourages and promotes party loyalty indirectly. A regime that allows voters who are registered members of one party to vote in another party's primary may well send a message to voters at large that party loyalty is of little or no importance. As the District Court warned, "'the party's right to define its membership becomes meaningless if it cannot limit membership to those individuals who are willing to identify themselves with the party and its message.'" Pet. App. 70 (quoting Borden, *Primary Elections*, 38 Harv. J. on Legis. 263, 277 (2001)). And this, of course, makes "registered party affiliations significantly less meaningful in the Oklahoma primary election system." *Id.*

On the other hand, a law requiring a voter formally to withdraw from his party in order to vote in another party's primary tends to reinforce and encourage party loyalty. At the same time, it helps to ensure that those who remain on a party's rolls are, in fact, those who feel most loyalty to the party.

In short, States that choose to organize their primaries as Oklahoma does have an "important regulatory interest[]" in

party loyalty and cohesion. That interest alone is more than enough to justify the kind of "reasonable, nondiscriminatory restrictions" inherent in a semi-closed primary. *Cf. Timmons*, 520 U.S. at 358 (internal quotations omitted).

3. The Disaffiliation Requirement Also Facilitates The Parties' Voter Turnout Efforts.

Finally, a closed or semi-closed primary system facilitates the parties' voter turnout efforts. As Justice Kennedy pointed out in *Jones*, "[e]ncouraging citizens to vote is a legitimate, indeed essential, state objective." 530 U.S. at 587 (Kennedy, J., concurring). Several other decisions of this Court have made the same point. See, *e.g.*, *Tashjian*, 479 U.S. at 220 (noting the importance of an informed electorate); *Eu*, 489 U.S. at 228 (same).

Accurate voter registration rolls, moreover, have a direct effect on voter participation. An oft-used and effective means by which political parties energize their core voters is by contacting them and reminding them to vote.[1] Yet these grass-roots efforts depend in large part on accurate voter registration rolls. Without accurate rolls, the party is left with little information on who, in fact, are the members of their organization, placing additional burdens on often already overtaxed organizations. *See, e.g., McConnell* v. *Federal*

[1] *See, e.g.*, Alan Johnson & Catherine Candisky, *New Emphasis on Voter Turnout Will Continue*, Columbus Dispatch, Nov. 7, 2004, at A1 (reporting that the Ohio Republican party made 3.5 million phone calls, knocked on 1.1 million doors and sent out 3.5 million pieces of literature in its grass-roots efforts in the recent Presidential election); Thomas Frank, *Experts Project An Upsurge In Voting*, Times Union, Oct. 31, 2004, at A14 (political parties will spend $300 million in efforts to encourage potential supporters through phone calls, e-mails and visits to ensure that they vote in the Presidential election); Jeff Zeleny, *Campaigns Drum Up Turnout*, Chi. Trib., Oct. 24, 2004, at C1; *Eu*, 489 U.S. at 223 (noting that an "'election campaign is a means of disseminating ideas as well as attaining political office.'") (quoting *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 186 (1979)).

Election Comm'n, 540 U.S. 93 (2003); *Colorado Republican Fed. Campaign Comm.* v. *Federal Election Comm'n*, 518 U.S. 604 (1996) (plurality opinion) (campaign finance laws leave parties with increasingly complex regulations on the speech which govern their activities, and occasionally limit the manner in which they may use funds).

When a voter is not required to disaffiliate before participating in another party's primary, however, the voter registration rolls are no longer an accurate reflection of party activity or feeling. As a result, as the district court found, party affiliation becomes "significantly less meaningful" (Pet. App. 59) and registration rolls thus become significantly less valuable tools for identifying and contacting like-minded voters. When that happens, the parties are unable to rely upon the registration rolls to contact their members, and must incur greater effort and expense to encourage voter participation.

By contrast, under a closed or semi-closed primary system, a voter whose political preferences have changed and who therefore wishes to vote in another party's primary must, at a minimum, withdraw her registration before she votes in a different party's primary. This helps ensure that voter registration rolls more accurately reflect the voters' true political preferences. And this, in turn, reduces the risk that a party volunteer contacting voters who are registered members of his party will waste his time on voters who do not, in fact, share the party's preferences and beliefs. By reducing the cost to a party of turning out like-minded voters, the closed or semi-closed system facilitates the parties' turnout efforts, and thereby (all else being equal) fosters increased voter turnout.

* * * *

In short, semi-closed primaries are an important and widely-used tool with which the States carry out their constitutionally required role of regulating "the Time, Place and Manner" of elections. Many states – more than one-third

of them – use these primaries to advance their important interests in protecting the integrity of the political parties and fostering voter participation in the electoral process. *See* Appendix A.[2] Semi-closed primaries, moreover, fit comfortably within this Court's First Amendment jurisprudence. The Tenth Circuit's contrary conclusion should therefore be reversed.

II. ALTERNATIVELY, IF THE COURT PERCEIVES AN IRRECONCILABLE CONFLICT BETWEEN A SEMI-CLOSED SYSTEM AND THE REASONING OF *TASHJIAN*, THAT DECISION SHOULD BE OVERRULED OR LIMITED TO ITS FACTS.

As explained above, the Tenth Circuit's decision to invalidate semi-closed primaries relied primarily upon this Court's decision in *Tashjian*. Although *amici* believe *Tashjian* casts no serious doubt on the constitutionality of semi-closed primaries, if the Court decides that there is no meaningful distinction between semi-closed primaries and the closed primaries stuck down in *Tashjian*, *amici* respectfully urge that *Tashjian* be overruled or limited to its facts. The majority opinion in that case failed to undertake the close analysis of burdens on associational rights required by this Court's subsequent decisions. Those decisions also establish that the burdens on which the *Tashjian* majority relied cannot

[2] Ariz. Rev. Stat. § 16-241 (2004); Cal. Elec. Code § 13102 (West 2004); Colo. Rev. Stat. § 1-3-101 (2004); Conn. Gen. Stat. § 9-431 (2003); Del. Code. Ann. tit. 15, § 3110 (2004); Fla. Stat. ch. 101.021 (2004); Iowa Code §§ 43-38, -42 (2004); Kan. Stat. Ann. § 25-4502 (2003); Ky. Rev. Stat. Ann. § 116.055 (Michie 2004); La. Rev. Stat. Ann. § 18-1280.25 (2004); Mass. Gen. Laws. ch. 53, § 37 (2004); Neb. Rev. Stat. § 32.312 (2004); Nev. Rev. Stat. 293.287 (2004); N.H. Rev. Stat. Ann. § 659.14 (2004); N.J. Rev. Stat. § 19:23-45.1 (2004); N.M. Stat. Ann. § 1-12-7 (2004); N.Y. Elec. Law § 1-104.9 (McKinney 2004); N.C. Gen. Stat. § 163-59 (2004); Okla. Stat. tit. 26, § 1-104 (2004); 25 Pa. Stat. § 292 (2004); R.I. Gen. Laws §§ 17-9.1-24, -15-24 (2004); S.D. Codified Laws § 12-6-26 (Michie 2004); W.Va. Code § 3-1-35 (2004); Wyo. Stat. Ann. § 22-5-212 (Michie 2004).

be considered sufficiently "severe" to require strict scrutiny under current doctrine.

A. *Tashjian*, Which Was Decided Before *Burdick* Established The Distinction Between "Severe" And Modest Burdens, Incorrectly Assumed That Any Burden On Associational Rights Triggers Strict Scrutiny.

Six years after the Court decided *Tashjian*, it decided in *Burdick* that "the rigorousness of our inquiry into the propriety of a state election law depends upon the *extent* to which a challenged regulation burdens First and Fourteenth Amendment rights." 504 U.S. at 434 (emphasis added). Only laws that place a severe burden on those rights, the Court held, are subject to strict scrutiny. *See id.* ("[W]hen those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance.") (internal quotations omitted). To be sure, many of the Court's cases prior to *Burdick* contained lengthy considerations of the severity of the burden imposed on the protected activity and fit comfortably within the *Burdick* framework. *See, e.g., Anderson* v. *Celebrezze*, 460 U.S. 780, 786-95 (1983) (containing a lengthy discussion of the burdens imposed by the challenged law). But *Burdick* appears to have been the first decision in which this Court firmly established that a regulation imposing relatively modest burdens on First Amendment rights is not subject to strict scrutiny.

The *Tashjian* majority, however, imposed strict scrutiny without any real consideration of the severity of the burdens involved. Instead, the majority's opinion focused almost exclusively on the importance of the protected rights asserted by the challenger. The opinion insisted, for example, that the "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech," *Tashjian*, 479 U.S. at 214 (internal quotations omitted), and that "the

freedom to join together in furtherance of common political beliefs necessarily presupposes the freedom to identify the people who constitute the association," *id.* (internal quotations omitted).

These statements are undoubtedly correct characterizations of the importance of the constitutional rights at issue. But establishing the importance of those rights does not answer the question of how much of a burden the challenged law places upon them.

In short, in light of *Burdick* and subsequent decisions, it was error for the *Tashjian* majority to conclude that strict scrutiny was warranted *without* a finding that the burdens on First Amendment rights were severe.

B. As The Dissent In *Tashjian* Pointed Out, Requiring A Voter To Register With A Party Before Voting In That Party's Primary Imposes Only A Modest Burden On The Party's Associational Interests, One That Is More Than Outweighed By The State's Legitimate Interest In Party Integrity.

If the Court were to undertake now the analysis that the *Tashjian* majority ignored, *amici* believe the Court should and would conclude that the burden at issue there was too small to warrant strict scrutiny, and would find that a fully closed primary adequately furthers important state interests.

1. To be sure, as explained above, the burden on association at issue in *Tashjian* was greater than that at issue here. The regulation there required a voter registered with one party but wishing to vote in another party's primary not only to disaffiliate from her existing party, but also to *join* the new party. *See* 479 U.S. at 212.

But even that burden, as three of the current Justices forcefully argued in dissent, is small. *Id.* at 235 (Scalia, J. dissenting) (joined by Rehnquist, C.J., and O'Connor, J.). As

the dissent pointed out, a voter "who, while steadfastly refusing to register as a Republican, casts a vote in the Republican primary, forms no more meaningful an 'association' with the Party than does the independent or the registered Democrat who responds to questions by a Republican Party pollster." *Id.* The only way a party establishes a truly meaningful association with a voter (as opposed to a candidate or donor) is by persuading the voter to join the party. If a voter does not wish to join the party as a condition of voting in its primary, that is a good indication that the voter does not really wish to have a serious association with the party. And a law imposing that condition thus cannot be seen as imposing any substantial burden on the party's associational rights.

To put the point another way, under closed primary systems, voters and parties are free to associate as they please. There is no restriction on any citizen's ability to vote in the primary of his or her choice. The only requirement is that the citizen formally affiliate with the party whose future destiny he or she is seeking to shape. This is simply not a significant burden.

This conclusion is supported by the Court's subsequent decisions. In *Timmons*, for example, the Court found that a requirement that candidates formally associate with a single party did not impose a severe burden. *Timmons*, 520 U.S. at 363. If requiring exclusive affiliation of *candidates* appearing on a party's ballot is not a severe burden, then requiring the exclusive affiliation of *voters* prior to casting a ballot in party's primary also cannot be a severe burden. In both cases the law merely places a requirement of minimum formality on the affiliation.

2. In light of the minimal burden a closed primary imposes, the state's interest in maintaining the integrity of political parties are more than sufficient to justify such a regime. As the dissent in *Tashjian* pointed out, the primary system itself was developed to protect political parties'

integrity by ensuring that their membership is involved in selecting candidates. 479 U.S. at 236-37 (Scalia, J., dissenting). Furthermore, closed primaries can serve the state's legitimate interest in protecting political parties from raiding by other parties. *See Rosario*, 410 U.S. at 760 (discussing the state's legitimate interest in preventing raiding).

Whatever the strength of such interests under strict scrutiny, they are more than adequate to justify the less exacting standard that applies to laws that place only a small burden on associational rights. *Tashjian*, therefore, was wrongly decided. It should be overruled or limited if the Court believes it is a significant obstacle to sustaining the validity of semi-closed primaries.[3]

[3] *Tashjian* could be overruled or limited to its facts without any violence to this Court's jurisprudence in this area. The only case during the period between *Tashjian* and *Burdick* that dealt with a challenge to an election-related law was *Eu*, 489 U.S. at 222-29. There, the Court relied on *Tashjian* to strike down a California law that forbade parties from endorsing candidates in their own primaries and imposed complex regulations on the mechanisms by which the parties choose their own officers. But those restrictions would be invalid without *Tashjian*. The prohibition on endorsing candidates is a content-based speech restriction and would be subject to strict scrutiny under ordinary free-speech law. *See Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."). And the regulations of party officers is precisely the sort of interference with internal party affairs that the Court has found to be a severe burden in other cases. *See, e.g., Jones*, 530 U.S. at 573 (discussing the limits on states' ability to regulate the "parties' internal processes").

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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APPENDIX A

CLOSED OR SEMI-CLOSED PRIMARIES

Arizona	Ariz. Rev. Stat. § 16-241 (2004)
California	Cal. Elec. Code § 13102 (West 2004)
Colorado	Colo. Rev. Stat. § 1-3-101 (2004)
Connecticut	Conn. Gen. Stat. § 9-431 (2003)
Delaware	Del. Code. Ann. tit. 15, § 3110 (2004)
Florida	Fla. Stat. ch. 101.021 (2004)
Iowa	Iowa Code §§ 43-38, -42 (2004)
Kansas	Kan. Stat. Ann. § 25-4502 (2003)
Kentucky	Ky. Rev. Stat. Ann. § 116.055 (Michie 2004)
Louisiana	La. Rev. Stat. Ann. § 18-1280.25 (2004)
Massachusetts	Mass. Gen. Laws. ch. 53, § 37 (2004)
Nebraska	Neb. Rev. Stat. § 32.312 (2004)
Nevada	Nev. Rev. Stat. 293.287 (2004)
New Hampshire	N.H. Rev. Stat. Ann. § 659.14 (2004)
New Jersey	N.J. Rev. Stat. § 19:23-45.1 (2004)
New Mexico	N.M. Stat. Ann. § 1-12-7 (2004)
New York	N.Y. Elec. Law § 1-104.9 (McKinney 2004)
North Carolina	N.C. Gen. Stat. § 163-59 (2004)
Oklahoma	Okla. Stat. tit. 26, § 1-104 (2004)
Pennsylvania	25 Pa. Stat. § 292 (2004)
Rhode Island	R.I. Gen. Laws §§ 17-9.1-24, -15-24 (2004)
South Dakota	S.D. Codified Laws § 12-6-26 (Michie 2004)
West Virginia	W.Va. Code § 3-1-35 (2004)

Wyoming	Wyo. Stat. Ann. § 22-5-212 (Michie 2004)

OPEN PRIMARIES

Alaska	Alaska Stat. § 15-25-010 (2003)
Arkansas	Ark. Code. Ann. §§ 7-3-101, -7-308 (2003)
Georgia	*See* Georgia Secretary of State web site: http://www.sos.state.ga.us/elections/elections/voter_information/default.htm
Hawaii	Hawaii Rev. Stat. § 12-31 (2003)
Idaho	Idaho Code § 34-411 (2004)
Illinois	10 Ill. Com. Stat. 5/4-22 (2004)
Indiana	Ind. Code Ann. § 3-7-13-2 (2004)
Michigan	Mich. Comp. Laws. § 168.575 (2004)
Minnesota	Minn. Stat. § 201.061(3) (2003) (allowing registration on the day of election without requiring registration for a particular party).
Mississippi	*See generally* Miss. Code Ann. §§ 23-15-191, *et seq.* (2004) (outlining primary election procedure)
Missouri	*See* Mo. Rev. Stat. §§ 115.137, .397 (2004)
Montana	Mont. Code Ann. § 13-10-301(2) (2004)
North Dakota	*See generally*, N.D. Cent. Code § 16.1-01, *et seq.* (2003) (outlining North Dakota election law, which does not require voter registration)

Ohio	*See generally* Ohio Rev. Code Ann. §§ 3505.18, 3513.13 (Anderson 2004) (party affiliation determined by voting in a primary, but not before)
South Carolina	S.C. Code Ann. § 7-9-20 (2003)
Tennessee	Tenn. Code Ann. § 2-7-115 (2004)
Texas	*See generally* Tex. Elec. Code Ann. §§ 172.111, *et seq.* (Vernon 2004) (outling primary election procedure)
Vermont	Vt. Stat. Ann. tit. 17, § 2363(a) (2004)
Virginia	Va. Code Ann. § 24.2-545(A) (2004)
Wisconsin	Wis. Stat. § 8.12 (2003)

OTHER PRIMARY SYSTEMS

Alabama	Ala. Code § 17-16-14 (2004) (no requirement exists that mandates registration for any particular party)
Maine	Me. Rev. Stat. Ann. tit. 21-A, § 340 (2003)
Maryland	Md. Code Ann., Elec., § 8-202(c) (2003) (requiring each party to give the state notice if it wishes to open its primary)
Oregon	Or. Rev. Stat. § 254.365(1) (2003)
Utah	Utah Code Ann. § 20A-3-104.5 (2004)
Washington	Wash. Rev. Code. § 29A.52.130 (2004)